In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE PORTSMOUTH HARBOR LAND AND Hotel Company, a corporation; Caroline E. Peabody; Amory Eliot, administrator of the estate of Mary R. Peabody, deceased; S. Ellery Jennison and Mary M. Jennison, appellants,
v.
THE UNITED STATES.

No. 905.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S MEMORANDUM IN REPLY TO APPELLANTS' "MOTION TO REMAND."

Comes now the United States, appellee in the above-entitled cause, by its Solicitor General, and for answer to appellants' "motion to remand" sets forth as follows:

I.

That in the petition in the court below (par. 10) appellants alleged that—

> On or about November 23, 1914, the United States took said land for the public use by discharging all of the said guns over and across it * * * ;

and further alleged (par. 11)—

> That the value of the claimants' land taken as aforesaid, is fairly and reasonably not less than seven hundred thousand dollars ($700,000) of which sum claimants as aforesaid have received no part in compensation.

That there was no allegation of a taking other than the aforesaid in said petition.

That the court found the said lands to be worth at the time of the alleged taking in 1914, $125,000.

That in the case of *Peabody* v. *The United States*, 231 U. S. 530, 540, a suit over the same property alleged herein to have been taken, this court declared that:

> * * * This suit was tried in the latter part of the year 1910 and it appeared that none of the guns had been fired for over eight years. When the suit was brought in 1905, nearly two years and a half had elapsed since the firing of a shot. The guns have been fired only upon two occasions, or three times in all, and this firing took place in 1902, shortly after the installation of the guns, for the purpose of testing them.
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> * * * We deem the facts found to be too slender a basis for a decision that the property of the claimants has been actually appropriated and that the Government has thus impliedly agreed to pay for it.

That the sole question before the Court of Claims and now before this court is whether or not appellants' property was taken by the firing of the guns in 1914, and, if so, its value at that time. The court

found the value at said date. The purpose of appellants' motion is to remand the case to the Court of Claims in order to have said findings 3, 4, and 5 amended so as to show the value of the property in 1902 before guns were installed or fired. Such amendments showing value would be wholly immaterial for the reason that there is no allegation in the petition of a taking other than in November, 1914, and for the further reason that the court has already held in *Peabody* v. *The United States, supra*, that there was no taking in 1902.

II.

That appellants' motion to remand in order to amend the findings of fact is improperly made at this time. Previous to the granting of the appeal by the Court of Claims, and before the latter lost jurisdiction of the case, appellants had their opportunity. It is now too late for appellants to move for a new trial, which the granting of this motion would in effect compel the Court of Claims to allow.

III.

Wherefore, it is submitted that the said motion should be denied.

JOHN W. DAVIS,
Solicitor General.
HUSTON THOMPSON,
Assistant Attorney General.

APRIL, 1918.

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